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Dan-Bunkering (Singapore) Pte Ltd v The Owners of The Ship or Vessel 'PDZ Mewah' of Port Klang & Anor

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HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO WA-27NCC-8–01 OF 2017
ATAN MUSTAFFA JC
9 AUGUST 2021

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Civil Procedure — Admiralty — Action in rem — Plaintiff had civil claim against defendant — Plaintiff filed in rem action against defendant and took out warrant issued by High Court to arrest defendant's ship — Whether action taken by plaintiff conferred on it status of statutory lienholder/secured creditor having the
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right to sell the ship and use the proceeds of sale to settle its claim — Whether ship ceased to be part of common pool of assets of ship owner to which creditors of ship owner could have recourse in settlement of their debts — Whether plaintiff's right to be paid from the proceeds of sale of ship took priority over other creditors of ship owner

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To satisfy its civil claim against the second defendant ('D2'), the plaintiff applied for a warrant in the instant in rem action to arrest a ship ('the vessel') it contended belonged to D2. The first defendant ('D1') was also named in the action because at the time the action was filed it had not been conclusively
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determined which of the two defendants was the true owner of the vessel. To prevent the vessel deteriorating while it was under arrest, the parties entered into a consent order for the vessel and the consumables on board to be valued and sold pursuant to a court ordered sale. When an interested buyer ('Somap') offered to buy the vessel for USD1,534,368 (the vessel had a market value of
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USD2m), the plaintiff successfully applied to court to sanction the sale to Somap at that price. The total proceeds from the sale of the vessel and its bunkers, amounting to RM6,884,288.47, was subsequently banked into an account jointly held by the solicitors for the plaintiff and D1 pending the court's determination on how the proceeds of sale should be paid out.
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Meanwhile, the trial of the instant suit decided that D2 was the beneficial owner of the vessel ('the judgment'). The plaintiff subsequently applied for a court order setting out the order of priority of payment of the proceeds of sale. In its application, the plaintiff proposed that all payments due to the court for the conduct of the sale and all expenses incurred for the arrest, preservation and
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maintenance of the vessel and the transfer of its title to Somap be settled first before the amount payable to the plaintiff in settlement of its claim against D2 was paid. It was also proposed that after the plaintiff's claim was paid, all other claims of lesser priority be dealt with *pari passu*. The defendants objected to the plaintiff's application and, inter alia, applied for the consent order to be set

aside and the entire proceeds of sale to be paid over to D2 (since the judgment declared that it was the beneficial owner of the vessel) for distribution amongst its creditors in its winding up.

Held, allowing the plaintiff's application and dismissing the defendants' applications:

(1) When the writ in rem was issued against the vessel, a statutory lien accrued in favour of the plaintiff which conferred on the plaintiff the status of a secured creditor. As the statutory lienholder, the plaintiff was not affected by any change in ownership of the vessel and was entitled to pursue its claim in rem against the vessel by realising the same and using the proceeds of sale to answer its claim. The vessel was arrested as security for the plaintiff's claim against D2, thus the plaintiff ranked higher than the other creditors of D2 in the order of priority of payments from the proceeds of sale. D2 did not have the right to dispose of the vessel and was not entitled to the proceeds of sale even if it was declared the beneficial owner of the vessel. The vessel no longer formed part of the common pool of assets available to D2 and its unsecured creditors until the secured claim of the plaintiff had been satisfied (see paras 32, 37–38 & 50).

(2) When the in rem action was initiated by the plaintiff, it was legally accorded the status of a statutory lienholder (and therefore a secured creditor) upon the sale proceeds. The vessel was arrested by the plaintiff as a pre-judgment security. The presentation of the winding up petition against D2 and the winding up of D2 were events that came after the commencement of the in rem action and after the statutory lien had accrued in favour of the plaintiff. Therefore, for the purpose of the winding up proceedings, the plaintiff was to be treated as a secured creditor (see paras 43–44).

(3) There was no merit to the contention that the consent order should be set aside on the ground that when it was entered into the parties were under a mistake as to the identity of the true owner of the vessel and as to D2's rights over the vessel. There was also no merit to the contention that the consent order had deprived D2 of its rights to sell and deal with the vessel. At the time the consent order was entered into, the issue of who was the beneficial owner of the vessel was a live issue to be determined at the trial. Therefore, the parties did not enter into the consent order on any assumption of who was the vessel's owner. The consequences of entering into the consent order should have been obvious to both defendants who were represented by their solicitors. The defendants would have known that if the plaintiff succeeded in its claim, the court would find that D2 was the beneficial owner of the vessel and that the plaintiff had a lien over the vessel which entitled it to be paid from the proceeds of sale of the vessel in priority over others (see paras 67 & 72).

[Bahasa Malaysia summary

Untuk melaksanakan tuntutan sivil terhadap defendan kedua ('D2'), plaintif memohon waran di dalam tindakan in rem ini untuk menahan kapal ('kapal') yang milik D2. Defendan pertama ('D1') juga dinamakan dalam tindakan ini kerana pada masa tindakan ini difailkan, belum ditentukan secara muktamad mengenai pemilikan sebenar kapal tersebut. Untuk mengelakkan kapal tersebut terjejas semasa ditahan, pihak-pihak telah memeterai perintah persetujuan untuk vesel dan barangan di atas kapal untuk dinilai dan dijual menurut perintah mahkamah. Pembeli ('Somap') menawarkan untuk membeli kapal itu dengan harga USD1,534,368 (kapal itu mempunyai nilai pasaran sebanyak USD2 juta), yang mana plaintif berjaya memohon kepada mahkamah untuk membenarkan penjualan kepada Somap pada harga tersebut. Jumlah hasil jualan kapal dan tempat menyimpan bahan api, berjumlah RM6,884,288.47 dimasukkan ke dalam akaun bersama peguam bela bagi plaintif dan D1 sementara menunggu keputusan mahkamah mengenai cara hasil jualan perlu dibayar. Sementara itu, perbicaraan saman ini diputuskan bahawa D2 adalah pemilik berhak kapal tersebut ('penghakiman'). Plaintif kemudiannya memohon perintah mahkamah yang menetapkan perintah keutamaan pembayaran hasil jualan. Di dalam permohonannya, plaintif memohon supaya semua bayaran yang kena dibayar kepada mahkamah bagi pengendalian penjualan dan semua perbelanjaan yang ditanggung untuk penahanan, pemeliharaan dan penyelenggaraan vesel dan pemindahan hak miliknya kepada Somap diselesaikan terlebih dahulu sebelum amaun yang perlu dibayar kepada plaintif sebagai penyelesaian tuntutannya terhadap D2 dibayar. Plaintif juga memohon agar selepas tuntutan plaintif dibayar, semua tuntutan lain yang lebih rendah keutamaannya dikendalikan dengan *pari passu*. Defendan-defendan membantah permohonan plaintif, antara lain, memohon perintah persetujuan diketepikan dan keseluruhan hasil jualan dibayar kepada D2 (sejak penghakiman tersebut mengisytiharkan bahawa D2 adalah pemilik berhak kapal) untuk dibahagikan secara bersama kepada pemiutang-pemiutang di dalam prosiding penggulungan.

Diputuskan, membenarkan permohonan plaintif dan menolak permohonan defendan-defendan:

(1) Apabila writ in rem dikeluarkan terhadap kapal tersebut, satu lien statutori terakru memihak kepada plaintif sebagai pemiutang. Sebagai pemegang lien, hak plaintif tidak terjejas oleh sebarang perubahan mengenai pemilikan kapal dan berhak untuk meneruskan tuntutannya in rem terhadap kapal tersebut dan mendapatkan hasil jualan seperti yang dituntut. Kapal tersebut ditahan sebagai jaminan bagi tuntutan plaintif terhadap D2, oleh yang demikian plaintif mempunyai prioriti dari pemiutang lain untuk pembayaran hasil jualan. D2 tidak mempunyai hak untuk melupuskan kapal dan tidak berhak atas hasil jualan tersebut walaupun telah diisytiharkan sebagai pemilik berhak

kapal. Kapal tersebut tidak lagi menjadi aset D2 dengan pemiutang tidak bercagar sehingga tuntutan plaintif telah dipenuhi (lihat perenggan 32, 37–38 & 50).

(2) Apabila tindakan in rem difailkan oleh plaintif, ianya memberikan hak kepada plaintif sebagai pemegang statutori lien yang berhak atas hasil jualan. Kapal itu telah ditahan oleh plaintif sebagai jaminan sebelum penghakiman. Petisyen penggulungan terhadap D2 telah difailkan dan lien statutori telah memihak kepada plaintif. Oleh itu, bagi tujuan prosiding penggulungan tersebut, plaintif hendaklah dianggap sebagai pemiutang yang dijamin (lihat perenggan 43–44).

(3) Tiada merit terhadap hujah bahawa perintah persetujuan harus diketepikan atas alasan ianya dimasuki pihak-pihak secara salah kerana identiti pemilikan kapal tersebut tidak diketahui akibat pemilikan D2. Tiada juga merit atas alasan perintah persetujuan telah mengenepikan hak D2 atas haknya untuk menjual dan berurusan atas vesel tersebut. Ketika perintah persetujuan dimeterai, isu pemilik berkepentingan adalah isu yang berterusan yang ditentukan di dalam perbicaraan penuh. Oleh yang demikian, pihak-pihak tidak memasuki perintah persetujuan atas dasar pemilikan vesel tersebut. Kedua-dua pihak dan peguamcaranya sepatutnya tahu mengenai akibat perintah persetujuan yang telah termeterai. Defendan-defendan sepatutnya tahu bahawa sekiranya plaintif berjaya di dalam tuntutan, mahkamah ini akan mendapati bahawa D2 adalah pemilik berkepentingan dan plaintif mempunyai hak lien atas vesel tersebut yang mana mempunyai hak atas hasil jualan akibat keutamaanya dari pemiutang yang lain (lihat perenggan 67 & 72).]

Cases referred to

Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors [2007] 1 MLJ 225, CA (refd)

Aro Co Ltd, In re [1980] Ch 196, CA (folld)

BSC Elevators Sdn Bhd v Sineo Enterprise Sdn Bhd & Anor [2016] MLJU 1147; [2016] 1 LNS 1767, HC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Baiduri Bank v Garnet Sdn Bhd and Anor [2010] MLJU 708, HC (refd)

Bukit Melita Sdn Bhd v Revolusi Rancak Sdn Bhd [2019] MLJU 1731; [2020] 2 CLJ 199, CA (refd)

Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application [1993] 3 MLJ 514, HC (refd)

Huddersfield Banking Company, Limited v Henry Lister & Son, Limited [1895] 2 Ch 273, CA (refd)

Kerajaan Malaysia v PKNS Engineering & Construction Bhd [2019] MLJU 1880, HC (refd)

Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761, FC (refd)

Kuo Fen Ching & Anor v Dauphin Offshore Engineering & Trading Pte Ltd [1999] 3 SLR 721; [1999] 2 SLR (R) 793, CA (folld)
Lee Chai Seng v Magnum Consortium Sdn Bhd [2015] MLJU 1871, CA (refd)
Lim Bock Lai v Selco (Singapore) Pte Ltd [1987] 2 MLJ 688 (folld)
Marsden v Marsden [1972] 2 All ER 1162 (refd)
Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors [1986] 1 MLJ 315; [1985] CLJ Rep 575 (distd)
Omega Holdings Bhd v Dato' Tiah Thee Kian & Ors [2002] 6 MLJ 20, HC (refd)
Osaka Resources Sdn Bhd & Ors v Foo Holdings Sdn Bhd and another appeal [2014] 1 MLJ 461; [2013] 1 LNS 984, CA (refd)
The 'Pangkalan Susu/Permina 3001'; Rasu Maritima SA v PN Pertambangan Minyak dan Gas Bumi Negara & Anor [1977] 2 MLJ 129, CA (refd)
Ramesh a/l Rajaratnam v SL Sharlini a/p Marnickam [2018] MLJU 1454; [2018] 1 LNS 1608, HC (refd)
The St Merriel; Smith's Dock Co Ltd v Owners of The MV St Merriel [1963] 1 All ER 537 (refd)
Tee Siew Kai (liquidators for Merger Acceptance Sdn Bhd (in liquidation)) v Machang Indah Development Sdn Bhd (in liquidation) (previously known as Rakyat Corp Sdn Bhd) [2020] 6 MLJ 168, FC (refd)
Tengku Reza Shah Tengku Chaidzir Shah v Asiapura Lands Sdn Bhd [2020] 1 LNS 478, HC (refd)
The Monica S [1968] P 741 (refd)
The Store (Terengganu) Sdn Bhd v Abi Construction Sdn Bhd & Anor [2013] 1 LNS 565, HC (refd)
Tokai Corporation v DKSH Malaysia Sdn Bhd [2016] MLJU 621, HC (refd)

Legislation referred to

Administration of Justice Act 1956 [UK]
Companies Act [SG] s 262(3)
Companies Act 2016 s 527
High Court (Admiralty Jurisdiction) Act [SG] s 4(4)
Insolvency Act 1967
Rules of Court 2012 O 41 r 5(2), 5(5), O 42 r 13, O 70 rr 21, 21(1), 23, O 92 r 4, Appendix B1, item 53
Senior Courts Act 1981 [UK] s 20(2)(m)

Oon Thian Seng (Wiwin Abdul Kahar with him) (TS Oon & Partners) for the plaintiff.
K Kandiah (Eric TS Lai and Tseng Seng Guan with him) (Mohd Latip & Assoc) for the first defendant.
Lim Wei Han (Shu Yin, Teh & Taing) for the second defendant.

Atan Mustaffa JC:

[1] This judgment concerns:

(a) the plaintiff's application (encl 438) against the defendant pursuant to O 70 rr 21 and 23 of the Rules of Court ('the ROC 2012') for determination of priorities and payment out from the proceeds of sale of a vessel;

(b) the second defendant's application (encl 433) pursuant to O 42 r 13 and O 92 r 4 of the ROC 2012 and the inherent jurisdiction of the court for orders relating to the payment of sale proceeds of a vessel, the setting aside of a consent order relating to the sale of the vessel and stay of proceedings pending the disposal of encl 433; and

(c) the first defendant's application (encl 489) for the setting aside of the said consent order relating to the sale of the vessel.

[2] I heard all three applications together and after reserving my decisions, on 26 April 2021 I decided as follows:

(a) encl 438 was allowed with costs to the plaintiff in the sum of RM3,000 to be paid by each of the defendants to the plaintiff;

(b) encl 433 was dismissed with costs to the plaintiff in the sum of RM3,000 to be paid by each of the defendants to the plaintiff; and

(c) encl 489 was dismissed with costs to the plaintiff in the sum of RM5,000 to be paid by the first defendant to the plaintiff.

[3] This judgment contains the full grounds for my decisions.

BACKGROUND FACTS

[4] The vessel 'PDZ MEWAH' (IMO No 9064009) ('the vessel') was arrested on 24 January 2017 at Pengerang, Johor pursuant to a warrant of arrest issued by the Kuala Lumpur High Court at the instance of Dan-Bunkering (Singapore) Pte Ltd, the plaintiff in this admiralty in rem action. The bailiff of the court executed the service of the warrant of arrest on the vessel on 24 January 2017.

[5] By a consent order dated 22 February 2018 ('the consent order'), it was ordered that, amongst others, the vessel and its bunkers, fuel, lubricants and other consumables onboard ('the bunkers'), if any, be appraised and sold by the sheriff by private treaty within two months from the date of the first appraisal, failing which the vessel will be sold through private treaty (open tender).

A **[6]** Pursuant to the consent order, the commission for appraisement and sale was issued by the court to the sheriff on 31 May 2018. An appraisement of the vessel was conducted by the sheriff appointed appraisers and the prevailing market value of the vessel was appraised to be within the region of USD2m.

B **[7]** Subsequently, an offer was received from a prospective purchaser, Somap International Pte Ltd ('Somap') who via their ship brokers submitted a letter of offer via email on 23 May 2018 to the sheriff of the High Court of Kuala Lumpur, where the prospective purchaser offered to buy the vessel at USD1,534,368 which is below the appraised value of USD2m.

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[8] The plaintiff then filed a notice of application ie encl 223 to have the vessel sold below the appraised value. On 20 July 2018 the High Court allowed the plaintiff's application for the vessel to be sold for USD1,534,368.

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[9] Pursuant to the consent order, the vessel and the bunkers remaining on board were sold to Somap at the aggregate sum of USD1,677,075 and the sale proceeds of the vessel in the sum of RM6,298,481.23 (after conversion from USD1,534,368) and also the sale proceeds for the bunkers remaining on board E in the sum of RM585,807.24 (after conversion from USD142,707) were paid by Somap into a joint Maybank Account No 514253533411 ('the Maybank account') held in the name of the solicitor for the plaintiff ie Mr Oon Thian Seng of Messrs TS Oon & Partners and the solicitor for the first defendant, ie Ms Kunamony a/p S Kandiah of Messrs Mohd Latip & Assoc, pending F determination of priorities. The plaintiff's solicitors, by way of an email dated 2 October 2018, informed the sheriff that the sale proceeds of the vessel in the sum of RM6,298,481.23 was paid into the joint account. On 22 October 2018, the vessel was released from arrest to facilitate the sale of the vessel to Somap.

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[10] The matter went for trial in February and March 2020 and on 3 August 2020, in the court's judgment dated 3 August 2020 ('the judgment') the court held that, amongst others, the second defendant is the beneficial owner of the H vessel and that the second defendant is to pay the plaintiff's claims.

THE APPLICATIONS

Enclosure 433

I

[11] In encl 433, the second defendant sought mainly for the following orders:

(a) that the plaintiff and the first defendant must pay the sale proceeds for the vessel namely RM6,884,288.47 and/or such other amount currently being held in the Maybank account within seven days from the date of the order to the first defendant;

(b) that the second defendant is allowed to set aside consent order; and

(c) that all proceedings in this action be stayed pending the disposal of the second defendant's application herein including the appeal, if any, arising from this application.

Enclosure 438

[12] In encl 438, which was opposed by both the first defendant and the second defendant, the plaintiff sought mainly for the following orders:

(a) that the order of priority of all claims against the proceeds of sale of the vessel in the sum of USD1,534,368 (or RM6,298,481.23) together with interest earned thereon if any ('the fund') be determined as follows:

(i) firstly, the sheriff's commission in respect of the sale of the vessel;

(ii) secondly, sheriff's expenses incurred by the plaintiff for preservation and maintenance of the vessel;

(iii) thirdly, the plaintiff's costs of and incidental to the arrest of the vessel including attendances before the sheriff up to the transfer of title to the successful purchaser of the vessel as producer of the fund;

(iv) fourthly, the plaintiffs claim as a statutory lienholder pursuant to the judgment; and

(v) lastly, all other claims of lesser priority, *pari passu*.

(b) payment out of the fund consistent with the order of priorities prayed for.

[13] The plaintiff's application for determination of priorities and payment out from the proceeds of sale of the vessel is made pursuant to O 70 r 21 of the ROC 2012, particularly O 70 r 21(1) which provides:

> Where in an action in rem against a ship the Court has ordered the ship to be sold, any party who has obtained or obtains judgment against the ship or proceeds of sale of the ship may —
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> (a) in a case where the order for sale contains the further order referred to in paragraph (2), after the expiration of the period specified in the order under subparagraph (2)(a); or

(b) in any other case, after obtaining judgment, apply to the Court by notice of application for an order determining the order of priority of the claims against the proceeds of sale of the ship.

[14] The plaintiff submitted that the priorities for the payment of the proceeds of sale of the vessel are in the following order and manner:

(a) firstly, towards the sheriff's commission in respect of sale of vessel where is entitled to commission as the vessel is being sold pursuant to the order of court. Appendix B1 High Court Fees, item 53 of the Rules of Court 2012 provides for the sheriff's commission to be calculated at 5% on the first RM1,000, and 2.5% on the excess of the sale proceeds of the vessel. The total amount for the sheriff's commission comes up to RM157,487.03;

(b) secondly towards the sheriff's expenses where the plaintiff should be reimbursed for the monies advanced by the plaintiff to the account of sheriff's costs and expenses for the preservation and maintenance of the vessel and her crew, as taxed in accordance with the plaintiff's bill of costs for sheriff's expenses dated 10 December 2018. This is pursuant to the consent order which provides for all costs arising out of and in connection with the execution of the omnibus order, if granted, including but not limited to the maintenance of the vessel and her crew, be made part of sheriff's costs and expenses and, where paid by the plaintiff, the said costs be paid to the plaintiff and/or its solicitor out of the sale proceeds of the vessel;

(c) thirdly, towards arresting party's costs which are incurred in connection with the arrest carried out by the plaintiff on 24 January 2017 which also includes the attendances before the sheriff, the vessel's appraisement and sale up to the transfer of title to the successful purchaser of the vessel;

(d) fourthly, towards the plaintiff's claim as a statutory lienholder pursuant to the judgment. The remaining sum after the sheriff's commission, sheriff's expenses and the arresting party's costs have been dealt with will be due to the plaintiff in satisfaction of the judgment granted in their favour and their status as the statutory lien holder; and

(e) lastly, towards other claims of lesser priority, *pari passu*. If there is any balance of sale proceeds left after all the claims of earlier priorities have been satisfied, this will be distributed to other claimants of lesser priority in *pari passu*. The second defendant, being an unsecured creditor will only receive their portion if there is any residue.

Enclosure 489

[15] In encl 489, the first defendant sought mainly for an order that the first defendant is allowed to set aside consent order. A

ISSUES FOR THE COURT'S DETERMINATION

[16] I considered the nature of all three applications by the second defendant in encl 433, by the plaintiff in encl 438 and by the first defendant in encl 489. The plaintiff's application in encl 438, although for determination of priorities and payment out from the proceeds of sale of the vessel, was resisted by the first defendant and the second defendant on some common grounds relied on by the second defendant for its application in encl 433 and by the first defendant in its application in encl 489. Thus it was appropriate for all three applications to be heard together. B C

[17] The common issues in encls 433, 438 and 489 are as follows: D

(a) whether the second defendant had the rights to sell and dispose of the vessel given that the court made a finding after trial that the second defendant has beneficial ownership of the vessel;

(b) whether sale proceeds of the vessel need to be distributed by the liquidator of the second defendant in accordance with s 527 of the Companies Act 2016 as the second defendant was wound up after the plaintiff commenced the action in rem; and E

(c) whether the consent order was null and void given that it was adjudged after the trial that the vessel was beneficially owned by the second defendant at the time the consent order was entered into. F

[18] A common issue which was raised in encls 433 and 438 is whether the plaintiff is entitled to the sale proceeds as prayed in encl 438 given that in the statement of claim the plaintiff only prayed for the second defendant to settle the plaintiff's claim and did not pray for the utilisation of the sale proceeds to settle the plaintiff's claim. G

[19] An issue which was particular to encl 433 is whether there are any special circumstances to stay encl 433 and all other proceedings in this action pending the determination of encl 438. H

PRELIMINARY OBJECTIONS

Affidavit of the plaintiff's solicitor I

[20] Before proceeding to the substantive issues, I wish to address a preliminary objection raised by the second defendant in respect of encl 438. The second defendant objected to the affidavit in support of encl 438 affirmed

by the plaintiff's solicitor (encl 439) on the ground that the solicitor affirmed an affidavit which contains substantial dispute as to facts, particularly at paras 16 and 21 where it was averred that there is no any other claimant against the second defendant or the vessel and/ there is no charge or lienholder in this matter.

[21] The second defendant relied on *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315; [1985] CLJ Rep 575 and *Ramesh a/l Rajaratnam v SL Sharlini a/p Marnickam* [2018] MLJU 1454; [2018] 1 LNS 1608 for the proposition that an affidavit in support affirmed by solicitors must be disregarded because there are disputed questions of fact known only by the litigant herself. It follows that encl 438 be dismissed as it has not been supported by any competent affidavit in support.

[22] The plaintiff in response submitted that the solicitor for the plaintiff is capable of affirming the affidavit in support on behalf of the plaintiff for the following reasons:

(a) the plaintiff's affidavit in support of encl 438 affirmed by the plaintiff's solicitor contains facts which are known to the solicitors from their records and are not facts which are disputed. The fact averred that there was no other statutory lienholder in respect of the vessel and who has obtained judgment against the vessel was derived from the fact that there were no valid and subsisting caveats against release and payment out filed by any party at the time encl 438 was filed; and

(b) as one of the solicitors having conduct of the present suit, the deponent for the affidavit in support would have access to the various cause papers filed in the present suit, and would have been aware of the existence of any other statutory lienholders based on the records at hand. This satisfies the requirement in O 41 r 5(5) of the ROC 2012 where an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information of belief with the sources and grounds. The plaintiff referred the court to *Kerajaan Malaysia v PKNS Engineering & Construction Bhd* [2019] MLJU 1880, *Tokai Corporation v DKSH Malaysia Sdn Bhd* [2016] MLJU 621, *Baiduri Bank v Garnet Sdn Bhd and Anor* [2010] MLJU 708 and *Omega Holdings Bhd v Dato' Tiah Thee Kian & Ors* [2002] 6 MLJ 20 in support of this submission.

[23] I find that there is no merit to the second defendant's objection. The solicitor for the plaintiff is capable of affirming the affidavit in support on behalf of the plaintiff as this was based on knowledge was derived from the fact that there were no valid and subsisting caveats against release and payment out filed by any party at the time encl 438 was filed based on the various cause

papers filed in the present suit. The plaintiff's solicitor would have been aware of the existence of any other statutory lienholders based on the records at hand.

[24] The affidavit in support does not run foul of O 41 r 5(2) of the ROC 2012 and it is a legally admissible and competent document for the current purpose.

[25] Further, despite the second defendant's objection to the plaintiff's solicitor averring that there was no other party that is claiming against the second defendant, the liquidator who would have knowledge of the same has not stated or provided proof otherwise and the second defendant's submission on this point is rejected.

Affidavit of the plaintiff's group legal counsel

[26] In encl 489, the first defendant raised a preliminary objection in relation to the plaintiff's affidavit in reply affirmed by Yip Wei Yen ('Ms Yip') who the first defendant described as the plaintiff's 'Parent Company's solicitor'. The first defendant contended that there were substantial dispute as to facts and the parent company may not have the requisite or personal knowledge of the case as the source of belief was never disclosed. The first defendant relied on the case of *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* for the proposition that solicitors should not file contentious affidavits in pending applications and only litigants should give evidence.

[27] The plaintiff pointed out that Ms Yip was the group legal counsel of the plaintiff at the time when the invoices were incurred and also took part in the negotiations which led to the settlement agreement which was part of her testimony at trial. Thus according to the plaintiff, she was not only giving testimony of documents in her possession but also as a person with direct knowledge of the facts.

[28] The first defendant's submission on this point is rejected and the preliminary objection is dismissed. Ms Yip is making an affidavit out of her personal knowledge given her involvement in the matter. She is also entitled to make the affidavit stating her belief with sources and grounds thereof. The plaintiff's submission that Ms Yip is affirming the affidavit as the plaintiff's parent company's solicitor is erroneous on the facts as Ms Yip is not the solicitor of the plaintiff's parent company but the group legal counsel. Thus the case of *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* referred to by the first defendant is not applicable as it deals with the issue of solicitors, not officers of the litigant, filing contentious affidavits.

[29] Having dismissed these preliminary objections, I move on to the substantive issues at hand.

ANALYSIS AND FINDINGS OF THE COURT

Rights of the second defendant to sell and dispose of the vessel

[30] The first defendant submitted for both encls 438 and 489 that the effect of the judgment, which states that the vessel was legally and beneficially owned by the second defendant, is that it is the second defendant which is vested with the rights to sell and dispose of the vessel. The first defendant relied on the cases of *The St Merriel; Smith's Dock Co Ltd v Owners of The MV St Merriel* [1963] 1 All ER 537 and *The 'Pangkalan Susu/Permina 3001'; Rasu Maritima SA v PN Pertambangan Minyak dan Gas Bumi Negara & Anor* [1977] 2 MLJ 129 to support the proposition that only the beneficial owner of a vessel has the rights to sell the vessel. It follows that when the vessel was sold, neither the plaintiff nor first defendant had the rights to dispose and sell the vessel without the consent of the second defendant who is the beneficial owner and the consent order ought to be set aside.

[31] The plaintiff submitted that the judgment declaring the second defendant as the beneficial owner of the vessel proves that the plaintiff's was claiming from the correct party liable for the losses that the plaintiff has suffered and that the admiralty in rem jurisdiction was correctly exercised against the vessel.

[32] The plaintiff submitted that as a statutory lienholder it is entitled to pursue their claim in rem against the vessel, realise the vessel and use the proceeds of sale to answer the plaintiff's claim. In relation to this it was further submitted by the plaintiff as follows:

(a) when the writ in rem was issued against the vessel, a statutory lien accrued in favour of the plaintiff;

(b) a statutory lien accrues to the claimant at the time the writ in rem issued and remains exercisable against the vessel despite a subsequent change of ownership of the vessel. The lien confers on its holder the status of a secured creditor for the purpose of corporate insolvency. The plaintiff referred the court to *The Monica S* [1968] P 741 for this proposition;

(c) the plaintiff's right as a statutory lienholder is not affected by the change of ownership as the court on 3 August 2020 found that the change of ownership was based on a sham transaction and the beneficial ownership of the vessel remained with the second defendants at the time the action was commenced; and

(d) as the vessel was amenable to the plaintiffs' in rem suit, the vessel was subject to any in rem judgment granted against it.

[33] I do not agree with the first defendant's submission that because it the beneficial owner it has the rights to sell and dispose of the vessel in the circumstances of the case. The position taken by the first defendant is correct only in circumstances which do not involve a sham transfer of a vessel as in this case. However, here, the plaintiff commenced the in rem action on 20 January 2017 against the owner of the vessel at the material time, the second defendant, to whom the plaintiff sold bunkers to and who failed to pay to the plaintiff part of the sum owed for the bunkers. The first defendant, who was the registered owner at the point the writ in rem was filed, served and the vessel arrested, filed its appearance and raised in its defence that the plaintiff vessel was already legally transferred from the second defendant to the first defendant on 30 November 2016 before the action was commenced and the vessel arrested. Thus, according to the first defendant, the admiralty in rem jurisdiction was incorrectly exercised against the vessel.

[34] The plaintiff thus had to advance its case that the beneficial ownership of the vessel remained in the second defendant despite the transfer of the vessel to the first defendant on 30 November 2016. This necessitated proving that the second defendant is the beneficial owner of the vessel at the trial on account that the transfer of the vessel was a sham. At the conclusion of the trial, the judgment declared that the vessel transfer was a sham and the second defendant is the beneficial owner of the vessel. This establishes that the plaintiff was claiming from the correct party liable for the losses (the beneficial owner of the vessel) that the plaintiff has suffered and that the admiralty in rem jurisdiction was correctly exercised against the vessel.

[35] Having established that the second defendant was indeed the beneficial owner of the vessel at the time the action in rem was brought, the question of whose right it is to sell and dispose the vessel is easily answered.

[36] When the plaintiff initiated the present in rem action, the plaintiff held the status as a statutory lienholder upon the sales proceeds who is is considered as a secured creditor as illustrated in the case of *The Monica S*. In this case, Brandon J, after an extensive review of authorities, ruled that a statutory lien accrues to the claimant at the time the writ in rem issued.

[37] Being the statutory lienholder upon the sales proceeds of the vessel, the plaintiff, apart from being entitled to pursue their claim in rem against the vessel, is also entitled to realise the vessel and use the proceeds of sale to answer the plaintiff's claim. The vessel was arrested as security for the plaintiff's claim

against the second defendant, thus the plaintiff ranks higher than the other creditors of the second defendant in the order of priority of the claims against the proceeds of sale of the ship.

[38] Therefore, the second defendant does not have the right to dispose the vessel and is not entitled to the sales proceeds even if it is declared the beneficial owner of the vessel.

Distribution of the sale proceeds by the liquidator

[39] The second defendant submitted that the sale proceeds of the vessel need to be distributed in accordance with s 527 of the Companies Act 2016 as the plaintiff has surrendered the vessel or sale proceeds of the vessel to the second defendant. Section 527 sets out the order of priority for payments of unsecured debts. The second defendant referred the court to the case of *BSC Elevators Sdn Bhd v Sineo Enterprise Sdn Bhd & Anor* [2016] MLJU 1147; [2016] 1 LNS 1767 to persuade the court to examine the conduct of the plaintiff and to decide whether the plaintiff has surrendered the security back to the liquidator.

[40] The first defendant also submitted that in this instance the liquidator has custody and control of the first defendant's property, the duty to collect the assets and apply them in the discharge of the company's liabilities relying on the case of *Tee Siew Kai (liquidators for Merger Acceptance Sdn Bhd (in liquidation)) v Machang Indah Development Sdn Bhd (in liquidation) (previously known as Rakyat Corp Sdn Bhd)* [2020] 6 MLJ 168 (FC).

[41] The plaintiff submitted that despite the subsequent insolvency of the second defendant, the plaintiff as a statutory lienholder is entitled to pursue their claim in rem against the vessel, realise the vessel and use the proceeds of sale to answer the plaintiff's claim, as it is a secured creditor of the vessel to the exclusion of all the unsecured creditors of the second defendant which was only wound up after the commencement of the action. In relation to this it was further submitted by the plaintiff as follows:

(a) as the plaintiff issued the writ in rem before the commencement of winding up it is is to be treated as a secured creditor for the purpose of winding up, relying on *In re Aro Co Ltd* [1980] Ch 196, *Lim Bock Lai v Selco (Singapore) Pte Ltd* [1987] 2 MLJ 688 and *Kuo Fen Ching & Anor v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 3 SLR 721; [1999] 2 SLR (R) 793;

(b) as the plaintiff is a secured creditor of the vessel and of the sale proceeds, the vessel and the sale proceeds do not fall into the common pool of assets available to the liquidator and the unsecured creditors of the second defendant;

(c) the second defendant is not entitled to payment out of the sales proceeds without the court making an order to determine the priorities of claims, including the second defendant's claim on the sales proceeds; and

(d) the plaintiff subnittted that is not subject to the law under the Companies Act 2016 nor the Insolvency Act 1967 despite the second defendant being now in liquidation as the plaintiff is a secured creditor and is entitled to the sales proceeds and the same can be used to satisfy the plaintiff's claim.

[42] I do not agree with the second defendant that the sale proceeds of the vessel are to be distributed in accordance with s 527 of the Companies Act 2016 after the second defendant was wound up as the plaintiff is a secured creditor of the vessel to the exclusion of all the unsecured creditors of the second defendant which was only wound up after the commencement of the action.

[43] When the in rem action was initiated on 20 January 2017, the plaintiff was legally accorded the status as a statutory lienholder upon the sales proceeds. The vessel was arrested by the plaintiff as pre-judgment security on 20 January 2017. As a statutory lienholder, the plaintiff is deemed a secured creditor. The winding up petition was presented against the second defendant on 27 February 2017 and the second defendant was wound up on 13 April 2017, after the commencement of the action and after the statutory lien accrued in favour of the plaintiff.

[44] The plaintiff's claim in respect of goods or material supplied to a ship for her operation or maintenance as provided in s 20(2)(m) of the Senior Courts Act 1981 and considered as a statutory lienholder once the plaintiff filed the writ in rem in the present action. A plaintiff who issues the writ in rem before the commencement of winding up is to be treated as a secured creditor for the purpose of winding up. In *Re Aro Co Ltd*, it was held that the plaintiff who issues the writ in rem before the commencement of winding up is to be treated as a secured creditor for the purpose of winding up. Brightman LJ said this:

> The usual object of suing in rem is to obtain security. The plaintiff becomes entitled upon the institution of his suit to the arrest and detention of the subject matter in the custody of an officer of the court pending adjudication, and on adjudication in his favour to a sale and satisfaction of his judgment out of the net proceeds thereof, subject to other claims ranking in priority to or *pari passu* with his own. So stated,

A the rights of a plaintiff suing in rem have points of similarity with the rights of a legal or equitable mortgagee or chargee, such persons are also entitled in appropriate circumstances to have the subject matter of the charge preserved for their benefit, and if the account is in their favour to have it sold in order to satisfy the debt. The similarity is carried a stage further by the decision in *The Monica S* [1968] P 741, where it was held that the burden of the statutory right of action in rem in a case under s 3(4) of the Administration of Justice Act 1956 ran with the ship so as to enable the plaintiff to serve the writ on the ship notwithstanding a transfer of ownership since the writ was issued. It must follow from that decision that the plaintiff in rem is entitled to have the ship arrested despite change in ownership and notwithstanding that the writ has not been served. The case is of critical importance to our decision because, applied to the instant case, it means that, had the liquidator sold the ship, he could only have sold subject to the plaintiffs' claim; this does not seem far removed from saying that the liquidator could only sell a proprietary interest, equivalent to a right to redeem.

...

It seems more logical to test the position of the plaintiffs by asking whether, immediately before the presentation of the winding up petition, they could properly assert as against all the world that the vessel Aro was security for their claim, not whether they could assert that they had invoked the jurisdiction of the Admiralty Court within the meaning of section 3 of the Act of 1956. If it is correct to say

... that after the issue of the writ in rem the plaintiffs could serve the writ on the Aro, and arrest the Aro, in the hands of a transferee from the liquidator and all subsequent transferees, it seems to us difficult to argue that the Aro was not effectively encumbered with the plaintiffs' claim. In our judgment the plaintiffs ought to be considered as secured creditors for the purpose of deciding whether or not the discretion of the court should be exercised in their favour under section 231.

[45] Brightman LJ reasoned that a statutory lienholder may be likened to a secured creditor such as a mortgagee or charge in two respects:

(a) first, with statutory lien, he is entitled to arrest the ship which will be subsequently be sold judicially so that the proceeds can be used to satisfy his claim, in the same way that a secured creditor is able to satisfy his claim from the proceeds of sale of the encumbered property; and

(b) secondly, he is entitled to arrest the ship after the writ has been issued notwithstanding any subsequent change of her ownership, which is what a secured creditor is entitled to do once his security is perfected.

[46] In *Lim Bok Lai v Selco (Singapore) Pte Ltd*, a decision of the Singapore High Court, the plaintiffs had filed the writs of admiralty in rem before the commencement of the winding up of the company, although none of the writs were served before the liquidation. Lai Kew Chai J granted the plaintiff's application in this case for leave to continue and pursue the action under s 262(3) of the Singapore Companies Act (Cap 50 1985 Ed). The court held:

> The issue of a writ in rem in exercise of what has been generally referred to as the statutory right of action in rem has crucial consequences which enure to the benefit of such plaintiffs. Their claims are not affected by any subsequent changes of ownership ...
>
> If I be right that the plaintiff is in this sense a 'secured creditor' this fact is also a substantial consideration in the exercise of my discretion, In all the circumstances, I exercise my statutory discretion and grant leave to the plaintiff to continue the relevant actions in rem.

[47] In *Kuo Fen Ching & Anor v Dauphin Offshore Engineering & Trading Pte Ltd*, the Singapore Court of Appeal had to decide whether a judgment in rem could be entered despite the fact that the vessel's owner, a company, had been dissolved. In delivering the judgment of the Court of Appeal, Karthigesu JA, commented:

> What is clear is that once a vessel is arrested, the ship, or the security provided in lieu of it, represents pre-judgment security. It also turned the respondents in this case into secured creditors of the owners of the Capricon. As such, it was held by the English Court of Appeal in *Re Aro Co Ltd* that a plaintiff who issued a writ against the ship before the owners were wound up becomes a secured creditor and that when the writ in rem is issued, the statutory lien accrues in favour of the plaintiff. This entitles the plaintiff to arrest and detain the ship and if the court adjudicates in his favour, to a judicial sale and satisfaction of his claim out of the proceeds of sale. The plaintiff's statutory lien is not defeated by any transfer of property apart from one effected by a judicial sale.

[48] The second defendant submitted that the cases of *In re Aro Co Ltd, Lim Bok Lai v Selco (Singapore) Pte Ltd* and *Kuo Fen Ching & Anor v Dauphin Offshore Engineering & Trading Pte Ltd* are not applicable because these are not decided in relation to an application pursuant to O 70 r 21(1) of the ROC 2012. I do not accept this submission as the underlying principles which govern whether the proceeds of sale of a vessel on which a statutory lien accrues are applicable in determining the order of priorities in such an application.

[49] Therefore, the plaintiff is not subject to the law under the Companies Act 2016 nor the Insolvency Act 1967 as submitted by the first defendant despite the second defendant being now in liquidation. The plaintiff being a secured creditor is entitled to the sales proceeds and the same can be used to satisfy the plaintiff's claim as held above.

[50] Given the clear position in law stated above the proceeds of the sale cannot be returned to the second defendant for the distribution in the liquidation process as the vessel no longer forms part of the common pool of assets available to the second defendant and its unsecured creditors until the secured claim of the plaintiff is satisfied.

No prayer in statement of claim the plaintiff for the utilisation of the sale proceeds to settle the plaintiff's claim

[51] The second defendant submitted that because the plaintiff only prayed for the second defendant to settle the plaintiff's claim and did not pray for the utilisation of the sale proceeds to settle the plaintiff's claim, the plaintiff is not entitled to the sale proceeds as prayed in encl 438 and the sale proceeds ought to be paid to the second defendant in encl 433 in order for the second defendant to satisfy the judgment granted in favour of the plaintiff when the court declared that the second defendant is the beneficial owner of the vessel on 3 August 2012. The second defendant referred the court to the cases of *Osaka Resources Sdn Bhd & Ors v Foo Holdings Sdn Bhd and another appeal* [2014] 1 MLJ 461; [2013] 1 LNS 984 (CA) and *Bukit Melita Sdn Bhd v Revolusi Rancak Sdn Bhd* [2019] MLJU 1731; [2020] 2 CLJ 199 for the proposition that the court cannot provide a relief which was not adverted to in the pleadings.

[52] The second defendant further submitted that by praying that the second defendant needs to settle the plaintiff's claim and for a declaration that the second defendant is a beneficial owner of the vessel, the plaintiff is be deemed to have surrendered the vessel or the sale proceeds of the vessel back to the second defendant.

[53] The first defendant and the second defendant both submitted that another reason why the sales proceeds should be sold by the second defendant is O 70 r 21 of the ROC 2012 is inapplicable under which encl 438 was filed by the plaintiff. According to the first defendant O 70 r 21 is only applicable when the court orders the ship to be sold and when the plaintiff obtained a judgment against the ship or her proceeds of sale but in this instance the plaintiff did not obtain a judgment against the ship or proceeds of sale of the ship.

[54] The plaintiff submitted that it can apply for payment out after the determination of priorities by the court as it is enforcing its lien against the vessel after judgment. In this regard:

(a) the vessel was arrested as security for the plaintiff's claim and the in rem action accorded the plaintiff with the status of a statutory lienholder. The lien operated on the vessel and when she was sold, the in rem proceedings apply equally to the sale proceeds as the 'Res' taking place of the vessel;

(b) the plaintiff is not required to specifically state in the pleadings that the vessel and her sales proceeds should be used to satisfy the plaintiff's claim, as that was the very purpose of the vessel being arrested in the first place; and

(c) the arrest serves to provide pre-judgment security to the plaintiff in the present action and the vessel is therefore subject to any in rem judgment granted against it as the vessel was amenable to the plaintiff's in rem action.

[55] It is my respectful view that the first defendant and the second defendant are misconceived as to the principles of law that apply in an in rem action and misapplied the law relating to obtaining reliefs based on prayers and pleadings. The first defendant and second defendant's submissions are therefore rejected. By diverting the court's attention to the issue of the prayers pleaded by the plaintiff in the in rem action, the first and second defendants have ignored the object of the vessel being arrested and the plaintiff's status of a statutory lienholder and its consequent rights to the vessel and the sales proceeds.

[56] I agree with the submissions of the plaintiff. Although in the pleadings it was not specifically stated that her sales proceeds should be used to satisfy the plaintiff's claim, this was not necessary as when the ship is arrested the ultimate purpose is to provide pre-judgment security to the plaintiff who as a secured creditor, is entitled to the vessel and the sales proceeds for the purpose of satisfying the plaintiff's claim. The finding by the court that the beneficial owner of the vessel is the second defendant confirms the entitlement of the plaintiff as the secured creditor and that the vessel was properly arrested as she belonged to the second defendant even if there was a transfer of the ship from the first defendant to the second defendant. The cases of *In re Aro Co Ltd*, *Lim Bok Lai v Selco (Singapore) Pte Ltd* and *Kuo Fen Ching & Anor v Dauphin Offshore Engineering & Trading Pte Ltd* which I referred to earlier are followed.

[57] The in rem action accorded the plaintiff with the status of a statutory lienholder, which is considered as a secured creditor and having priority over the sales proceeds of the vessel. The arrest serves to provide pre-judgment security to the plaintiff in the present action. The vessel is therefore subject to any in rem judgment granted against it.

Validity of the consent order

[58] It is the first defendant's position that because this court had decided after the trial that the vessel was beneficially owned by the second defendant at the time the consent order to sell the vessel to Somap for the price of USD1,534,368 was entered, the first defendant had no capacity or was not entitled to enter into the consent order and the vessel was sold without the second defendant's consent. Hence the filing of encl 489 to set aside the consent order. In this regard the first defendant further contended that the

second defendant's solicitor was never a signatory of the stakeholder joint account into which the monies from the sale of the vessel were held.

[59] The first defendant further contended that the consent order had the effect of disposing the second defendant's rights to deal and sell the vessel but after trial it was determined that the beneficial owner of the vessel is the second defendant. The first defendant thus submitted that consent order must be set aside as it was entered opposed to second defendant's rights, interest and consent as the beneficial owner of the vessel.

[60] On the power of the court to set aside a consent order, the first defendant submitted as follows:

(a) a consent order which lacks consensus ad idem or free consent caused by fraud, mistake, total failure of consideration, misrepresentation, coercion, undue influence and other grounds in equity could be set aside as held in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (FC);

(b) the court has jurisdiction to set a consent order aside when the order was proceeded upon the common mistake of a material fact, relying on *Huddersfield Banking Company, Limited v Henry Lister & Son, Limited* [1895] 2 Ch 273;

(c) even a consent order which was final and had been perfected could be set aside in the same action following the decision in *Marsden v Marsden* [1972] 2 All ER 1162; and

(d) a consent order can be set aside when it was entered by a party that was with ignorant to his interest, relying on *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761.

[61] The first defendant further submitted that the consent order had directly affected the second defendant's rights and interest and the deprivation of the second defendant's rights and interest to sell and deal with the vessel might occasion injustice. The first defendant referred the court to the case of *Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors* [2007] 1 MLJ 225 and *Lee Chai Seng v Magnum Consortium Sdn Bhd* [2015] MLJU 1871 for the proposition that when there is a breach of the rules of natural justice the court has the jurisdiction to have its orders declared as void.

[62] The second defendant in encl 433 also prayed for the setting aside of the consent order. It submitted that the consent order ought to be set aside as there is a change of circumstances as subsequent to the consent order, the court on 3 August 2020 declared that the second defendant is the beneficial owner of the vessel. Further, the consent order was entered by the parties on the

understanding that the first defendant is the rightful owner of the vessel and not the second defendant. The second defendant referred the court to the case of *The Store (Terengganu) Sdn Bhd v Abi Construction Sdn Bhd & Anor* [2013] 1 LNS 565 to support the proposition that fresh circumstances can warrant the court to set aside an order of the court.

[63] The second defendant submitted in the alternative that there was a mistake on the identity of the owner of the vessel and the rights of the second defendant in respect of the vessel as it was the understanding, leading to the consent order, that the owner of the vessel was first defendant and not the second defendant. Therefore, the consent order was vitiated due to mistake by the parties or the second defendant. The second defendant also referred the court to *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* as an authority for the proposition that a consent could be set aside if the free consent that the order is based is vitiated by mistake.

[64] The plaintiff submitted that the consent order was not entered into on the assumption that the first defendant was the beneficial owner of the vessel as the issue of ownership of the vessel was a contested issue between the parties and it has always been the plaintiffs contention that the second defendant was the owner of the vessel and that the first defendant came into possession of the vessel via a sham transaction. According to the plaintiff, the vessel was sold with the consent of the second defendants. In this regard, the plaintiff further submitted as follows:

(a) the consent order was entered into by the plaintiff, the first defendant and the second defendant on the basis that the vessel's condition continued to deteriorate and that there was a potential buyer for the vessel ie Somap;

(b) it was upon the agreement of all three parties that to avoid the value of the vessel from further diminishing due to her condition, the vessel should be sold pursuant to the consent order;

(c) there was never an agreement between parties that the first defendant was the registered owner of the vessel and it was the plaintiff's contention that the second defendant owned the vessel;

(d) at that point of time, the identity of the owners of the vessel was still in question where the ownership of the vessel was the subject matter of the trial and only on 3 August 2020 it was decided that the second defendant was the beneficial owner of the vessel;

(e) the sales proceeds in a Maybank joint account in the names of the plaintiff's solicitors and the first defendant's solicitors are held on behalf

of the sheriff who still has custody of the proceeds where parties could only deal with this sum with the concurrence of the sheriff or an order of court;

(f) when the consent order was entered it was not only between the plaintiff and the first defendant as the second defendant was represented by its own solicitors who would have advised the second defendant as to the effect of the consent order and executed the consent order on behalf of the second defendant; and

(g) it is the new liquidators who have a change of heart although earlier the company in liquidation validly consented to the order which still stands.

[65] Before proceeding with my analysis and finding on this point I wish to address an objection by the first defendant to the plaintiff's submissions on the ground of res judiacata. The first defendant took objection to the plaintiff's submissions that pending the determination of the contested issue of ownership of the vessel by way of a trial, the consent order was entered into by the plaintiff, the first defendant and the second defendant on the basis that the vessel's condition which was under the custody of the sheriff, continued to deteriorate and that there was a potential buyer for the vessel ie Somap and it was the agreement of all three parties that to avoid the value of the vessel from further diminishing due to her condition, the vessel should be sold pursuant to the consent order. The first defendant argued that the plaintiff is barred by estoppel and res judiacata as the plaintiff is attempting to relitigate the matter which has been decided by the court that the beneficial ownership belongs to the second defendant.

[66] I find no merit in this submission. There is no relitigation here as the plaintiff is not arguing the issue of beneficial ownership of the vessel but rather submitting on the circumstances that the consent order was entered into by the parties which is the central issue in this application.

[67] The court accepts the plaintiff's submission. The consent order was recorded on 20 July 2018. The issue of beneficial ownership was raised by the plaintiff as early as 10 March 2017 when the plaintiff filed its reply and defence to the counterclaim. At the point of entering into the consent order, the issue of who is beneficial owner of the vessel was already raised and was still a live issue to be determined at the trial. Parties could not have entered into the consent order on any assumption of whom the vessel belonged to. Thus it cannot be said that when parties entered into the consent order it was on the assumption that the first defendant owned the vessel.

[68] I also observe that the first defendant's only evidence on this point is a bare averment by Tan Chor How Christopher, the deponent of the first

defendant's affidavit in support of encl 489 where he states at para 6: A

> 6. Saya sesunggunya menyatakan bahawa Perintah Persetujuan ini telah dimasuki atas anggapan bahawa Defendan Pertama adalah pemilik benefisial vesel.

[69] No other material was before the court on the issue that parties entered into the consent order based on the assumption that the first defendant was the beneficial owner of the vessel. B

[70] It is factually not true that the consent order was entered only between the plaintiff and the first defendant and the vessel was sold without the second defendant's consent. The averments of Tan Chor How Christopher in his affidavit indicates otherwise. He said at para 5: C

> Saya sesungguhnya menyatakan bahawa *satu perintah persetujuan telah dimasukkan pada 20.07.2018 antara Plaintif, Defendan Pertama dan bekas Pelikuidasi Defendan Kedua* di mana hasil jualan vessel PDZ Mewah (selepas ini dirujuk sebagai 'Vesel tersebut') dibayar ke dalam satu akaun yang dipegang bersama atas nama peguamcara Plaintif, Defendan Pertama dan bekas peguamcara Defendan Kedua sementara menunggu penentuan keutamaan. (Emphasis added.) D

[71] The minutes of 20 July 2018 also shows that the solicitor for second defendant, Mohammad Danial of Messrs S Ravenesan was in attendance when the consent order was entered into. In fact there were some oral amendments to the prayers of the application (encl 223) and both the first defendant and second defendant confirmed the amendments with no objections. The second defendant also signed off on the draft order (encl 235). It is perplexing to see why the first defendant insisted that the consent order was entered into without the second defendant's consent. E F

[72] The consequences of entering into the consent order ought to be clear to the first defendant and the second defendant who were represented by their solicitors. The outcome that, if the plaintiff were to be successful in its claim, that the court will find that the second defendant is the beneficial owner of the vessel due to the sham transfer and that the plaintiff has a lien over the vessel which entitles payment to the plaintiff out of the proceeds of sale of the vessel ought to be obvious to the first defendant and the second defendant. There is thus no merit to the contention of the second defendant that the understanding of parties when the consent order constitutes a mistake on the identity of the owner of the vessel and the rights of the second defendant in respect of the vessel. There is also no merit to the first defendant's submissions that the consent order had directly affected the second defendant's rights and interest by depriving the second defendant's rights and interest to sell and deal with the vessel. G H I

[73] The cases of *The St Merriel* and *The Pangkalan Susu/Permina 3001* do

not assist the first defendant. In *The St Merriel*, the issue before the court was whether there was beneficial ownership of a vessel held under a possessory lien and the court held that under the Administration of Justice Act 1956 an 'other charge' on any ship does not include a possessory lien. The court then went on to explain what 'beneficial ownership' entails in the context of when an action *in rem* lies to enforce a maritime lien or other charge on any ship for the purpose of the Act. In *The Pangkalan Susu/Permina 3001*, the issue was whether a person who had only full control and possession of the ship arrested beneficially owned the ship within the meaning of s 4(4) of the Singapore High Court (Admiralty Jurisdiction) Act. Holding it did not, the court explained that 'beneficial use' is not the same as beneficial 'ownership'. In both cases, there is no question regarding whether a party adjudged by the court after trial to have beneficial ownership of a ship should hold the proceeds of sale of the vessel.

[74] Here I wish to note that the defendants' argument on the consent order being invalid has fallen and the sheriff's rights to deal with the proceeds is intact. There is no reason for the second defendant to now hold the sale proceeds. The issue that is left is only how to distribute the proceeds.

Special circumstances for stay

[75] The second defendant prayed in encl 433 for all other proceedings in this action to be stayed until the determination of encl 433 first as other proceedings including the notice of taxation of the costs incurred by the sheriff and the determination of priority for the pay out of the sale proceeds in encl 438 will render encl 433 nugatory and academic as both the application in encls 433 and 438 or any further proceedings concerned involve determination by this court on the sale proceeds for the vessel.

[76] The second defendant submitted the stay application is necessary as any proceedings if allowed to proceed, including the notice of taxation of the costs incurred by the sheriff and the determination of priority for the pay out of the sale proceeds will render encl 433 nugatory and academic as both the applications in encls 433 and 438 and any further proceedings concerned involve determination by the court on the sale proceeds for the vessel. The status quo on the sale proceeds of the vessel must be preserved until the disposal of the second defendant's application in encl 433. The second defendant relied on the High Court case of *Tengku Reza Shah Tengku Chaidzir Shah v Asiapura Lands Sdn Bhd* [2020] 1 LNS 478 to argue that on a balance of convenience the status quo must be preserved by the stay.

[77] The plaintiff submitted that the second defendant has not shown any proof that its encl 433 has any special circumstances which render it necessary for the stay on the plaintiffs encl 438 to be granted. In support of this submission, the plaintiff relied on the case of *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514 which held that to show special circumstances the appplicant must show that there is something exceptional in character.

[78] I rejected the submission of the second defendant as it has not proven that there are special circumstances which render the stay is to be granted. The second defendant only made averments as to the fact that there is an appeal against the judgment dated 3 August 2020 which concerns the alleged wrongful arrest of the vessel and the court's decision on the setting aside of the consent order in encl 438 would be rendered academic if the plaintiff's application for the determination of priorities were to proceed. These by themselves do not constitute special circumstances and in fact the second defendant did not aver that these were special circumstances to justify the stay.

[79] In any event, encl 433 and encl 438 are both being determined by the court on the same issues, mainly relating to the right of the plaintiff as a statutory lienholder and secured creditor to the proceeds of sale of the vessel. There is no need to dispose encl 433 before encl 438 as these could be heard together.

CONCLUSION

[80] Considering the totality of the facts and circumstances of the case as disclosed in the affidavit evidence, it was quite clear to me that the plaintiff had clearly met the requirements for the orders for determination of priorities and payment out from the proceeds of sale of the vessel pursuant to O 70 r 21 of the ROC 2012 to warrant the court to allow encl 438. The second defendant and the first defendant's applications in encls 433 and 489 respectively are also dismissed due to, for the main part, the plaintiff's status as a statutory lienholder and a secured creditor following *In re Aro Co Ltd*, *Lim Bok Lai v Selco (Singapore) Pte Ltd* and *Kuo Fen Ching & Anor v Dauphin Offshore Engineering & Trading Pte Ltd*.

Plaintiff's application allowed and defendant's application dismissed.

Reported by Ashok Kumar